SUBRAMANIA PILLAY v. SUNDARAMMAL

[F.C. (Barakbah L.P., Suffian F.J., and Yong J.) June 13, 1968]

[Ipoh — Federal Court Civil Appeal No. X76 of 1967]

Principal and Agent — Power of attorney — Power of agent — Power to borrow upon any security "real or personal".

The appellant had lent $11,300 to one Karuppiah the duly constituted attorney of the respondent. The loan was unsecured. The question in this case was whether the attorney had acted in excess of the power conferred on him by clause 12 of the power of attorney. Clause 12 read as follows: "To charge any of my said lands and to borrow upon any security real or personal or by means of advances to be obtained on goods and merchandise and for that purpose to sign all necessary charges and other documents." In the court below the appellant's claim was dismissed. ([1968] 1 M.L.J. 30).

Held, dismissing the appeal: the power of attorney gave the agent power to borrow on the security of real or personal property and therefore in this case the attorney had exceeded his power in borrowing without security.

Cases referred to:—

(1) *Inland Revenue Commissioners* v. *Parker* [1965] 1 Ch. 866.

(2) *Grimwade* v. *Mutual Society* (1884), 52 L.T. 409.

(3) *Bryant, Powis and Bryant* v. *La Banque du Peuple* [1893] A.C. 170.

(4) *Forbes* v. *Ross* (1788), 2 Bro. C.C. 430; 29 E.R. 240.

(5) *Pickard* v. *Anderson* (1871-2), 13 Eq. Cases 608.

(6) *Langston & Ors.* v. *Ollivant & Ors.* (1807), G. Coop. 33; 35 E.R. 467.

FEDERAL COURT.

M. Shanker for the appellant.

P. P. Dharmananda for the respondent.

Cur. Adv. Vult.

Suffian F.J.: On the 30th day of January, 1964, the plaintiff (appellant) lent $11,300 to one PR. Karuppiah as the duly constituted attorney of the defendant (respondent). It was an unsecured loan.

It is admitted that the loan was contracted a week after the defendant had left on a visit to India and that she returned to this country on the 24th August, 1964. It is not disputed that at the material time Karuppiah was the duly constituted attorney of the defendant under a power of attorney.

The defendant, however, denies liability because the money was borrowed without her consent or knowledge or because she did not receive any part thereof, and even if her attorney did borrow the money, he had acted in excess of the authority to borrow conferred on him by the power of attorney.

At the hearing both parties agreed that there was only one issue to be resolved, namely, whether Karuppiah the attorney had acted in excess of the authority to borrow conferred on him by clause 12 of the power of attorney. Clause 12 reads as follows:—

> "12. To charge any of my said lands and to borrow upon any security real or personal or by means of advances to be obtained on goods and merchandise and for that purpose to sign all necessary charges and other documents."

Mr. Dharmananda for the defendant contended that under clause 12 the attorney had authority to borrow upon the security of the donor's property but had acted in excess of his authority in obtaining an unsecured loan.

Mr. Arulanandom for the plaintiff, on the other hand, contended that the power to borrow conferred by clause 12 was wide enough to include the taking of an unsecured loan. He argued that, as the general powers conferred by the power of attorney in question were wide, clause 12 should also be construed as widely as possible. Finally he argued that the widest power to borrow which could be conferred on an attorney was the power to borrow on the security of the donor's property and therefore the power to borrow without security should be implied in the power conferred by clause 12.

The learned trial judge disagreed with this contention and dismissed the claim with costs.

The plaintiff appeals to this court.

Before us Mr. Shanker for the appellant (plaintiff) again argues that clause 12 empowers the attorney to take an unsecured loan on behalf of the donor. He says that the clause may be re-written as follows:—

> "The attorney is empowered:—
>
> (i) to charge any of the defendant's lands;
>
> (ii) to borrow on any security real;
>
> (iii) to borrow on any security personal;
>
> (iv) to borrow by means of advances to be obtained on goods or merchandise; and
>
> (v) for that purpose to sign all necessary charges and other documents."

Re-written in this way, Mr. Shanker submits, the clause empowers the attorney to borrow in three ways:—

(a) on security real or

(b) on security personal or

(c) by way of advances to be obtained on goods and merchandise.

Way (c) clearly shows, he says, that the attorney can borrow on the security of personal property which goods and merchandise are. With this I agree. Mr. Shankar further says that, if so, to hold that way (b) also means that the attorney may borrow on the security of personal property, would be to hold the words "personal security" superfluous that it cannot be the intention to make these words superflous and therefore the intention clearly was to make that

way mean that the attorney can borrow on his own personal liability. Mr. Shankar says that (b) should be read separately from (a) and not together, and read separately (b) clearly authorises the attorney to take an unsecured loan.

I regret that I am unable to accept this argument.

As was said by Ungoed Thomas J. in *Inland Revenue Commissioners* v. *Parker* [1] at page 881:—

> "'Securities' is not a term of art, and it has no precise meaning. It may refer to security secured on real estate, or on personal estate, or by personal convenant, or to shares and investments generally."

And as was said by Chitty J. in *Grimwade* v. *Mutual Society* [2] at page 415:—

> "The term 'personal security' is now well understood . . . . It includes every case where nothing more is obtained than the personal liability of the borrower, or of the borrower and sureties. It is the same thing as a loan on personal liability only."

I agree that personal security normally means security by personal convenant. But whether or not "personal security" in a particular document includes a loan on personal liability depends, in my view, on the terms of the particular document, for words are seldom used in isolation, and almost always in relation to each other or to some other words. Here the relevant clause uses the words "on security real or personal", and every law student seeing the word "real" juxtaposed with "personal" knows that "personal" only means one thing, and that is personal property as distinct from real property. In my view "real or personal" is a technical phrase and has a technical meaning long settled by the courts.

Now the principle is this, as was stated by their Lordships of the Privy Council in *Bryant, Powis and Bryant* v. *La Banque du Peuple* [3] at page 177:—

> ". . . . powers of attorney are to be construed strictly — that is to say, that where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power, it is necessary to shew that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication."

Looking at the instrument as a whole and giving it a fair construction, I am of the opinion that clause 12 does not authorise the donee to accept a loan on his personal liability. To hold otherwise is to hold that the clause authorised him to take a loan with or without security. The power is not a home-made document, it is couched in legal language, and, if the intention was to authorise the attorney to borrow without security, the draftsman should have had little difficulty in making that intention clear. He could simply have written clause 12 to read:—

> "To charge any of my said lands *and to borrow with or without security* and to sign all necessary charges and other documents."

He did not do so.

At first sight, two cases seem to be in favour of the appellant.

First, there is *Forbes* v. *Ross* [4] decided nearly two centuries ago in 1788. There a testator had directed two trustees, of whom the defendant Ross was one, to lay out money which should come to their hands, on "heritable or personal security", at such rate of interest as they should think reasonable. The two trustees agreed that Ross, "a man of large property", should take the money on personal security, paying 4% interest. The court ordered him to pay 5% interest. This implied that personal security in the expression "heritable or personal security" included a loan on personal liability. I think that that case is distinguishable because there there was no objection taken to Ross the trustee borrowing on his personal liability. The only objection taken was to the rate of interest he was paying.

Then there is the case decided some 100 years later, of *Pickard* v. *Anderson.* [5] There trustees of a marriage settlement were empowered, with the consent of the husband and wife, to invest the trust funds on such security "either real or personal" as they, with such consent, should think proper. Part of the trust funds (£2,500 in all) were lent to the husband on his note of hand, him paying interest at 5% — The court allowed this. There again there was consent, by the ultimate beneficiary of the trust.

I prefer to follow *Langston & Ors., infants* v. *Ollivant & Ors.*,[6] decided in 1807, instead of the above two cases. There a testator authorised trustees to lay out trust money upon "real or personal security" to the use of his daughter for life, and afterwards to and amongst her children; and he declared that his trustees should not be answerable for any loss which might happen, without their wilful neglect or default. They lent the money to his daughter's husband "upon his bond". The husband became a bankrupt. The court held that the trustees had no authority to lend the money on the husband's personal liability and so were liable for the loss. It is to be noted that, unlike in the previous two cases, in this case the propriety of the transaction was questioned whereupon the court pronounced it improper.

For the above reasons, I would dismiss this appeal with costs.

Barakbah L.P. and Yong J. concurred.

Appeal dismissed.

Solicitors: *Shearn, Delamore & Co.; Dharmananda & Co.*